IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROYCE EARL OLSON, JR.,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. 96-CV-637-B (J)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #10) filed on March 10, 1998, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On April 20, 1998, Petitioner filed his objection to the Report (#14).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed and the petition for writ of habeas corpus denied.

BACKGROUND

The Magistrate Judge has succinctly summarized the facts underlying Petitioner's criminal convictions in the Report and the Court will only briefly repeat those facts here. During a jury trial held on May 15 and 16, 1995, Petitioner was found guilty on two counts of sexual abuse involving a minor. The jury recommended a sentence of eight years on each count, to run consecutively for a

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total of sixteen (16) years. A sentencing hearing was held on July 5, 1995. Petitioner testified in his own behalf. He testified that his counselor, Dr. Inbody, had recommended that Petitioner receive a minimum of two years of counseling in the sex offender program and 300 hours of community service. (Sentencing Hrg. Trans. at 15). The case worker for Petitioner's family, Monty Veel, as well as one of Petitioner's sons, also testified at the sentencing hearing. After listening to the testimony and the arguments of counsel, the trial/sentencing judge concluded that he would follow the jury's recommendation and sentenced Petitioner to two consecutive eight year terms and imposed fines totaling $2,007.

Petitioner appealed to the Oklahoma Court of Criminal Appeals, challenging only the sentence imposed by the trial judge. He argued that both the prosecuting attorney and the attorney representing the two minor children committed misconducts requiring modification of his sentence. He also requested that the fines should be suspended or reduced. On June 20, 1996, the appellate court affirmed Petitioner's sentences.

DISCUSSION

Petitioner filed the instant petition for writ of habeas corpus on July 12, 1996, raising the same allegations of error he raised on direct appeal to the Oklahoma Court of Criminal Appeals. The Magistrate Judge determined that Petitioner's claims were exhausted. The Magistrate Judge also concluded that none of the alleged errors constituted constitutional violations and that the petition should be denied for that reason. See 28 U.S.C. § 2254(a). However, the Magistrate Judge also reviewed Petitioner's claims on the merits. Finding the claims to be meritless, the Magistrate Judge recommends that the petition be denied.

Petitioner raises three (3) objections to the Magistrate Judge's conclusions: (1) the Report does not indicate that the Magistrate Judge considered an "appendix" submitted by Petitioner on December 23, 1996 (#8),[1] (2) documents submitted by Petitioner on 1-14-97[2] should have also been considered by the Magistrate Judge, and (3) the prosecutorial misconduct in this case violated rules of attorney conduct and that issue also should have been considered. (#14). Petitioner also requests that this Court reconsider his motion for appointment of counsel (#12), previously denied by Order filed April 9, 1998 (#13).

The Court has reviewed each of Petitioner's objections to the Magistrate Judge's findings on his habeas claims and finds them to be without merit. The Court has also reviewed the entire record in this case, including the documents identified in Petitioner's objection, and concurs with the Magistrate Judge's conclusion that Petitioner has asserted no violation of the United States Constitution. Furthermore, the case law cited and discussed by the Magistrate Judge supports the conclusion that none of Petitioner's claims is meritorious. Therefore, the Court agrees with the conclusion of the Magistrate Judge and finds that Petitioner's petition for writ of habeas corpus should be denied.

In light of this conclusion, the Court finds that Petitioner's request for this Court to reconsider his motion for appointment of counsel should be denied as moot.

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[1]The "appendix" submitted by Petitioner consists of a copy of Dr. Paul Inbody's resume.

[2]On January 13, 1997, the Court received from Petitioner a copy of his "Request for Documents" submitted to the Washington County Court Clerk. Petitioner's request apparently was related to a "motion for suspended sentence" which had been denied by the state district court on October 10, 1996.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed, and Petitioner's petition for writ of habeas corpus should be denied. The Court further finds Petitioner's request for reconsideration of his previously denied motion for appointment of counsel should be denied as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#10) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**
3. Petitioner's request that the Court reconsider its denial of the motion for appointment of counsel is **denied as moot.**

SO ORDERED THIS 6th day of May, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE WAYNE MARTIN,)
)
Petitioner,)
)
vs.) Case No. 96-CV-381-E
)
LEROY L. YOUNG,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 7 day of May, 1998.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WARDENE A. COX,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-797-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 6th day of MAY, 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALMA J. JAMES,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 97-C-27-M

ORDER

On March 30, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case with directions for an immediate award of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,131.25 for attorney fees and $158.53 costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $2,131.25 and $158.53 costs, for a total award of $2,289.78 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v.*

Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 6th day of May 1998.

Frank H. McCarthy

FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Phil Pinnell

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Assistant United States Attorney
333 West 4th Street., Suite 3460
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(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. TYLER,

Petitioner,

vs.

JIM OWEN, Warden,

Respondent.

ENTERED ON DOCKET

DATE 5-8-98

Case No. 96-CV-817-K

FILED

MAY 07 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 7 day of May, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. TYLER, Petitioner,	)	
vs.	)	No. 96-CV-817-K
JIM OWEN, Warden, Respondent.	)	

ORDER

Before the Court is the petition for writ of habeas corpus filed by Petitioner, a state inmate appearing *pro se*. Petitioner alleges he has a constitutional right to free transcripts so that he may prepare a collateral challenge to his conviction. Respondent has filed a Rule 5 Response to the petition (#6). Petitioner has filed a reply to Respondent's response (#7).

BACKGROUND

On April 29, 1993, a jury convicted Petitioner of Murder in the First Degree in Case No. CRF-92-102 in the District Court of Craig County and sentenced him to Life Without Parole. Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"). On July 11, 1995, the OCCA affirmed his conviction in an unpublished opinion, but modified Petitioner's sentence to Life With the Possibility of Parole.

On March 1, 1996, Petitioner filed a request for "designated record" in the Craig

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County District Court. After that court denied the relief requested, Petitioner appealed to the OCCA, requesting the court to issue a writ of mandamus directing the trial court to provide an appeal record at public expense. (#6, Ex. A). The OCCA found that "petitioner has not filed an application for post-conviction relief in the District Court, but it appears that he has only made a request for transcripts at public expense." The OCCA held that "until Petitioner files an application for post-conviction relief which makes a showing of need and raises a genuine issue of material fact, Petitioner would not be entitled to transcripts at public expense." The Oklahoma Court of Criminal Appeals denied Petitioner's application for writ of mandamus on May 28, 1996. (#6, Ex. B).

Thereafter, Petitioner filed the instant habeas action on September 10, 1996, alleging he was denied free transcripts in order to prepare a post-conviction application, apparently intending to raise ineffective assistance of trial and appellate counsel claims. Petitioner asserts the (1)"state's imprisonment is violative of the 1st Amendment right to sue for freedom which necessarily contemplates exam of records," (2) "state's imprisonment is violative of the 1st and 14th Amendment due process rights of access which necessarily imply access and review of state's reviewed designated record," and (3) "state's imprisonment is violate of the 14th Amendment equal protection clause, attempting to impede supremacy clause." (#1) Claiming his indigence as the basis for the state courts' denials of the transcripts, Petitioner in this federal habeas action "seeks

an order from this Honorable Court mandating state to provide designated record of appeal or this Court will issue the writ on the grounds that the state maintains Petitioner's conviction because of denials of due process and equal protection of the laws." (#3).

In his Response, Respondent contends all of Petitioner's grounds for relief are basically the same, i.e., that Petitioner is entitled to the transcripts and "record" at the public's expense. However, Respondent asserts Petitioner has not shown that he is entitled to the transcripts, nor that the state court determination was contrary to clearly established federal law or an unreasonable determination in light of the evidence presented. Therefore, Respondent argues Petitioner has failed to establish he is entitled to habeas relief.

In his reply, Petitioner, quoting Ake v. Oklahoma, 105 S.Ct. 1087, 1093 (1985), argues that "[j]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." As a result, Petitioner, relying on Griffin v. Illinois, 351 U.S. 12 (1956), believes that because a trial transcript is a necessary tool available to other Oklahoma post conviction applicants for a price, the state must provide a free copy to an indigent unable to buy one.

ANALYSIS

A. Exhaustion

A federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

In this case, Respondent states that he "does not believe Petitioner has exhausted his state court remedies" since Petitioner has not filed an application for post-conviction as recommended by the OCCA. However, pursuant to 28 U.S.C. § 2254(b)(3), the State, through counsel, has expressly waived exhaustion,[1] and therefore, this Court may consider Petitioner's claims on the merits.

[1]In his response, Respondent states that he "expressly waives the exhaustion required as the petition can be denied on the merits pursuant to § 2254(b)(2) and (3) as amended" (#6).

B. Right to Free Transcript

The Tenth Circuit Court of Appeals has held that "an indigent § 2254 petitioner does not have a constitutional right to access a free transcript in order to search for error." Ruark v. Gunter, 958 F.2d 318, 319 (10th Cir. 1992). Like Petitioner in this habeas action, Ruark argued he received ineffective assistance of counsel at his 1963 trial, but stated that he could not adequately fashion a § 2254 petition because the state had denied him access to a trial transcript. Applying the reasoning in United States v. MacCollom, 426 U.S. 317 (1976) (concluding that an indigent defendant's right of equal access to procedures for review of his conviction was satisfied at the collateral relief stage by affording a defendant a free transcript upon a showing of a particularized need for the transcript as required by 28 U.S.C. § 753), the Tenth Circuit determined petitioner Ruark had not colored his ineffective assistance claims with any factual allegations and that such "naked allegations" were not cognizable under § 2254. Ruark, 958 F.2d at 318; see also Hines v. Barker, 422 F.2d 1002 (10th Cir. 1970).

Furthermore, federal habeas corpus review does not serve as an additional appeal from state court. Robinson v. State of Oklahoma, 404 F. Supp. 1168, 1170 (W.D. Okla. 1975). "Rather, a federal court's inquiry is limited to the lawfulness of the present detention of a state prisoner." Esquibel v. Rice, 13 F.3d 1430, 1433 (10th Cir. 1994). In fact, 28 U.S.C. § 2254(a) permits a federal court to entertain a habeas petition "only on the ground that [the state prisoner] is in custody in violation of the Constitution or

laws or treaties of the United States."

In this case, Petitioner alleges that the state courts' refusal to provide copies of the trial transcripts so that he may prepare a collateral challenge to his conviction violates the due process and equal protection clauses of the United States Constitution (#7). However, this claim is without merit. Supreme Court precedent establishes that a defendant's constitutional right of equal access to the courts is satisfied by providing a defendant with a copy of his transcript on direct appeal and does not require an unconditional right to a transcript in collateral proceedings. MacCollom, 426 U.S. at 326 (requirements for receipt of transcript discussed in the context of a § 2255 proceeding). The Court notes that Petitioner's reliance on Griffin v. Illinois, 351 U.S. 12 (1956) is misplaced since the focus of the Court's analysis in that case was whether an indigent defendant was entitled to transcripts at state's expense in order to challenge a conviction on direct appeal.

To be entitled to transcripts at state expense, a petitioner must demonstrate that he has a nonfrivolous claim to present in a collateral challenge to his conviction. MacCollom, 426 U.S. at 326; see also Ruark, 958 F.2d at 319 (same requirements discussed in the context of a § 2254 proceeding); Sistrunk v. United States, 992 F.2d 258 (10th Cir. 1993). Petitioner in this case makes no effort to inform this Court of the nature of the claims he plans to raise in a collateral challenge. Furthermore, the record demonstrates that Petitioner failed to present any indication of the claim(s) he desired

to present in a collateral challenge to the Oklahoma courts. Therefore, the state courts' denials of Petitioner's requests for transcripts at state expense were entirely consistent with established Supreme Court precedent. This Court finds, therefore, that the relief requested by Petitioner should be denied.

CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws or treaties of the United States. Therefore, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is **denied.**

SO ORDERED THIS 7 day of May, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE WAYNE MARTIN,)
)
Petitioner,)
)
vs.) Case No. 96-CV-381-E
)
LEROY L. YOUNG,)
)
Respondent.)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his convictions in Tulsa County District Court, Case No. CRF-86-4355. Respondent has filed a Rule 5 response (#15) to which Petitioner has replied (#16). As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

During the early morning hours of December 4, 1986, Tulsa police received a report that a vehicle had been stolen from an employee of a pizza delivery business. Less than half an hour later, a Tulsa police officer stopped a car matching the stolen vehicle's description. An examination of the vehicle's registration and the owner's on the scene identification confirmed that the stopped vehicle was, in fact, the stolen vehicle. Petitioner, who was driving the vehicle, was arrested. The arresting officer later testified at trial that after being placed in the police car with the arresting officer, Petitioner overheard a radio dispatch confirming that the vehicle in question had been stolen. The

officer further testified that after hearing the dispatch, Petitioner stated that the car had been given to him and that he identified the vehicle owner as the man from whom he had received the vehicle. Nothing in the record indicates Petitioner had been advised of his constitutional rights as enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), prior to making these statements.

Petitioner was tried by a jury and convicted of Larceny of an Automobile, After a former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CRF-86-4355, and was sentenced to thirty-eight (38) years imprisonment. Petitioner perfected a timely direct appeal and on January 6, 1989, the Oklahoma Court of Criminal Appeals affirmed the judgement and sentence in an unpublished opinion.

On July 5, 1995, Petitioner filed an application for post-conviction relief in the state district court. That Court denied relief on August 2, 1995. Petitioner appealed and the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief on March 7, 1996.

Petitioner filed the instant petition for writ of habeas corpus on May 6, 1996. He asserts three grounds allegedly justifying habeas corpus relief: (1) "conviction obtained by trial court's use of erroneous and improper, jury instruction(s), in violation of state statutory law(s) regarding same, which did result in denying this petitioner the right(s) to an impartial jury: an fair trial: due process of the law: equal protection of the law: and, the right to remain silent," (2) "conviction obtained by use of evidence obtained pursuant to an unlawful arrest," and (3) "conviction obtained by violation of privilege against self-incrimination." (#1, at 4, 7, and 10).

In his response to the petition, Respondent argues that this Court is precluded from considering the merits of Petitioner's first two claims based on the state court's imposition of a procedural bar as to these claims, both of which were first raised in Petitioner's application for post-

officer further testified that after hearing the dispatch, Petitioner stated that the car had been given to him and that he identified the vehicle owner as the man from whom he had received the vehicle. Nothing in the record indicates Petitioner had been advised of his constitutional rights as enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), prior to making these statements.

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In his response to the petition, Respondent argues that this Court is precluded from considering the merits of Petitioner's first two claims based on the state court's imposition of a procedural bar as to these claims, both of which were first raised in Petitioner's application for post-

conviction relief. Respondent further argues that Petitioner's third claim is without merit, and that the petition for writ of habeas corpus should be denied. In reply, Petitioner urges that his claim of ineffective assistance of appellate counsel satisfies the "cause and prejudice" showing necessary to overcome the procedural bar imposed by the state court and that a failure to consider his claims would result in a fundamental miscarriage of justice.

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by showing either (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Petitioner raised his first and second claims in his application for post-conviction relief. His third claim was raised on direct appeal. Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v.

Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

A. Petitioner's claims (1) (improper jury instructions) and (2) (evidence obtained from unlawful arrest improperly admitted) are procedurally barred

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes Petitioner's first two claims as identified supra are barred by the procedural default doctrine. In affirming the state district court's denial of post-conviction relief on these two claims, the Oklahoma Court of Criminal Appeals stated that:

> A review of the issues raised by Petitioner reveals that each of them could have been presented on direct appeal and were not. Any issue which could have been

> raised on direct appeals but was not, is waived, absent sufficient reason why it was not raised on direct appeal or why it was inadequately raised. Robinson v. State, 818 P.2d 1250 (Okl.Cr. 1991); 22 O.S. 1991 § 1086. Post-conviction relief measures are not a substitute for a direct appeal. Johnson v. State, 823 P.2d 370, 373 (Okl.Cr. 1992).

(#15, Ex. E). Therefore, having determined Petitioner waived his post-conviction claims by failing to raise them on direct appeal, the state appellate court declined to consider the claims on the merits and affirmed the district court's denial of post-conviction relief. This state procedural bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which could have been but were not raised on direct appeal. Okla. Stat. tit. 22, § 1086; Robinson v. State, 818 P.2d 1250 (Okla. Crim. App. 1991).

Because of Petitioner's procedural default in state court, this Court may not consider his first and second claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause for his procedural default by alleging that his appellate counsel provided ineffective assistance in failing to challenge on direct appeal the propriety of several jury instructions and the admission of evidence obtained as the result of his "unlawful" arrest. In addition, Petitioner complains that his appellate counsel failed to contact him to discuss the issues to be raised in the direct appeal. Constitutionally ineffective assistance of counsel may establish cause excusing Petitioner's procedural default of these claims. Coleman, 501 U.S. at 753-54; McCleskey v. Zant, 499 U.S. at 493-94. To prevail on an ineffective assistance of counsel claim, Petitioner must first show that his counsel's performance was deficient. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner must allege facts that indicate counsel's representation "fell below an objective standard of reasonableness." Id. at 688. This Court presumes that Petitioner's counsel provided him reasonable professional assistance, and Petitioner must overcome the presumption that, under the circumstances, the challenged representation "might be considered sound trial strategy." Id. (internal quotation marks and citation omitted). Petitioner must also establish prejudice by showing "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. If Petitioner fails to establish either the performance or prejudice prong of the Strickland test, the ineffective assistance claim fails. See id.

Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992). In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally

inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); see also Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In this case, the Court concludes that because none of the issues raised by Petitioner was obviously meritorious at the time of Petitioner's direct appeal, their omission does not constitute ineffective assistance of counsel. Petitioner's appellate counsel chose to present two (2) evidentiary claims on direct appeal: (1) the state presented insufficient evidence to support the larceny of automobile charge, and (2) the trial court erred in admitting the testimony of the arresting police officer concerning statements made by Petitioner prior to the issuance of Miranda warnings. The Court finds that the issues now raised by Petitioner are not "clearly stronger" than those presented on appeal by appellate counsel and appellate counsel could have made a reasonable strategic choice to "winnow out" less meritorious arguments, Jones v. Barnes, 463 U.S. 745, 751-52 (1983), and focus the court's attention on the strongest and most viable claims for the appeal.

Petitioner claims his appellate counsel was ineffective for failing to challenge three (3) aspects of the jury instructions given at his trial. In evaluating this claim, the Court notes that to obtain relief for errors in the jury charge, the petitioner must show that the ailing instruction by itself so infected the trial that the resulting conviction violates due process by rendering the trial fundamentally unfair. See Estelle v. McGuire, 502 U.S. 62, 72 (1991). Petitioner first complains that the trial court instructed the jury the a defendant is "presumed not guilty" as opposed to "presumed innocent." See Docket #17, Petitioner's Exhibits, Jury Instruction No. 2. In Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995), a decision entered after Petitioner's conviction became final, the Oklahoma Court of Criminal Appeals determined that an instruction utilizing the phrase"presumed to be not guilty" rather than "presumed innocent" was reversible error. However, counsel is not ineffective for failing to anticipate arguments or appellate issues which only blossomed after the trial or appeal was complete. See Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court"); Coleman v. Saffle, 869 F.2d 1377, 1394 n.15 (10th Cir. 1989) (holding that competency of counsel should be measured by what he reasonably should have known at the time of trial, ten years earlier). The jury instruction given here falls far short of being "obvious from the trial record" and would not necessarily "have leaped out upon even a casual reading." United States v. Cook, 45 F.3d 388, 395 (10th Cir. 1995). Petitioner's appellate counsel was not required to anticipate that the Flores court would hold a "presumed not guilty" instruction unconstitutional. Petitioner has failed to show that his appellate counsel was constitutionally ineffective for failing to raise this issue on appeal.

Petitioner also alleges his appellate counsel provided ineffective assistance by failing to

challenge the use of both the Oklahoma Uniform Jury Instruction on larceny of an automobile (#17, Instruction No. 4) and the "Failure to Testify" instruction (#17, Instruction No. 7). After reviewing the record, the Court finds that neither of these instructions so infected the trial that the resulting conviction violates due process by rendering the trial fundamentally unfair. Therefore, Petitioner's appellate counsel did not provide ineffective assistance in failing to raise these challenges to the jury instructions on direct appeal.

Petitioner's assertion that the failure to challenge evidence obtained from his "unlawful" arrest on direct appeal was due to ineffective assistance of appellate counsel is also without merit. Petitioner claims that his appellate counsel was ineffective for failing to argue that the trial court erroneously admitted evidence obtained as the result of his arrest for larceny of an automobile by Tulsa police officers without probable cause. Failure to argue that the police lacked probable cause for petitioner's arrest does not fall below an objective standard of reasonableness when such an argument would likely be unsuccessful. Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). Probable cause sufficient for an arrest requires that a reasonable person would believe a crime had been, or is going to be, committed, and that the person in question is the one responsible. Terry v. Ohio, 392 U.S. 1 (1968). For the reasons set out below, this Court finds the Tulsa police officers had sufficient probable cause to arrest petitioner, and that counsel was not ineffective for failing to raise this ground on direct appeal.

First, the record shows that the arresting officer had received a report of a stolen vehicle only minutes before observing a vehicle matching the description of the stolen vehicle traveling on a Tulsa County highway. After stopping the vehicle, the police officer asked Petitioner, the driver, to identify himself and asked whether he owned the car. Petitioner said he did not own the car. Because

Petitioner was driving a car he did not own which matched the description of a vehicle reported stolen, it was reasonable for the arresting officer to believe that the crime of larceny of an automobile had already been committed, and that Petitioner was responsible for that crime. This Court finds it was reasonable for the police officer to believe Petitioner had been involved in the crime for which he was arrested. Because there was sufficient probable cause, counsel did not perform deficiently by not arguing this issue.

Similarly, Petitioner's complaint that his appellate counsel failed to contact him to discuss the merits of his claims on appeal does not constitute "cause" sufficient to excuse his procedural default of these claims. Jones v. Barnes, 463 U.S. 745 (1983), vests appellate counsel with great discretion in deciding which issues to raise on appeal, and counsel's exercise of discretion in this case was sound.

The Court concludes that Petitioner cannot succeed on an ineffective assistance of appellate counsel claim. Therefore, Petitioner has failed to establish "cause" to excuse his procedural default. In light of Petitioner's failure to demonstrate "cause," the Court need not analyze the "prejudice" component of the standard.

Petitioner's only other means of gaining federal habeas review of his procedurally defaulted claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). The "fundamental miscarriage of justice" exception to the procedural bar doctrine is narrow and applies only in "extraordinary" cases where an individual is "actually innocent" of the crime for which he has been convicted. McCleskey, 499 U.S. at 494. This case is not one of those "extraordinary" cases. Although Petitioner states that "a failure to consider His claims, within the instant Petition, would result in a fundamental miscarriage of justice," (#17, at 9 (emphasis in original)), he never claims that

he is "actually innocent" of the crime of which he was convicted.

Having failed to demonstrate cause and prejudice or a fundamental miscarriage of justice, Petitioner is unable to overcome the procedural default of his claims challenging the jury instructions and the admission of evidence obtained during his allegedly unlawful arrest. Therefore, this Court is precluded from considering those claims on the merits.

B. Petitioner fails to overcome presumption of correctness afforded state court's resolution of his third claim -- violation of privilege against self-incrimination

In his third claim, Petitioner claims that the trial court committed reversible error by allowing the arresting police officer to testify as to three (3) statements allegedly made by Petitioner after police made the traffic stop leading to Petitioner's arrest but before a Miranda warning had been issued. In addition, Petitioner complains that no hearing was held to determine the disputed voluntariness of these statements. See Jackson v. Denno, 378 U.S. 368, 369 (1964). According to Petitioner, this evidence prejudiced the jury, deprived him of his Fifth Amendment right to remain silent, and violated his right to due process of law.

This claim was raised by appellate counsel on direct appeal and was considered on the merits by the Oklahoma Court of Criminal Appeals. Federal courts entertaining habeas petitions must afford a presumption of correctness to state courts' legal and factual findings, absent some reason to doubt adequacy or accuracy of the application of federal law or of the fact-finding proceeding. 28 U.S.C.A. S 2254(d); see also Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997). An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).[1] This standard imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations. Houchin v. Zavaras, 107 F.3d 1465, 1470 (10th Cir. 1997). "[A]n application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996) (overruling on other grounds recognized by United States v. Carter, 117 F.3d 262, 264 (5th Cir.1997)), *cert. denied*, --- U.S. ----, 117 S.Ct. 1114 (1997).

After reviewing the record in this case, the Court finds that the state court's resolution of this issue did not involve an unreasonable application of Federal law nor was it based on an unreasonable determination of the facts. Petitioner's alleged error concerns the trial court's admission of a police officer's testimony. "In order for habeas corpus relief to be granted by a federal court based on a state court evidentiary ruling, the rulings must render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Vigil v. Tansy, 917 F.2d 1277, 1280 (10th Cir.1990) (quotation omitted). Trial courts have broad discretion regarding the admissibility of testimony. See

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[1]Because Petitioner filed his habeas petition on May 6, 1996, his petition is reviewed under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996) (effective April 24, 1996). See Lindh v. Murphy, --- U.S. ---, ---, 117 S.Ct. 2059, 2068 (1997).

United States v. Davis, 40 F.3d 1069, 1073 (10th Cir.1994). This Court's review of the record reveals nothing constitutionally infirm in the trial court's decision to admit this evidence.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 7 day of May, 1998.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELEANOR E. BRADFORD,
SSN: 446-52-8965

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-7HJ

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 4 day of May 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELEANOR E. BRADFORD,
SSN: 446-52-8965

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-71-J

ORDER[2/]

Plaintiff, Eleanor E. Bradford, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff alleges the following errors on appeal: (1) the record on appeal is not complete, (2) substantial evidence does not support the ALJ's assessment of the Plaintiff's residual functional capacity ("RFC"), and (3) the ALJ's findings at Step Four are incomplete. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge Steven C. Calabrese (hereafter "ALJ") concluded that Plaintiff was not disabled on August 1, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on November 18, 1996. [R. at 6].

(15)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born February 16, 1950, and was 45 years old at the time of the hearing before the ALJ. [R. at 57]. Plaintiff testified that her biggest problem was pain. According to Plaintiff she suffers from headaches, left shoulder pain, back pain, and knee pain. Plaintiff stated that she sometimes suffered from headaches which lasted for two or more days and that the headaches never really went away. [R. at 62-62].

Plaintiff testified that on an average day she woke up at around 10:30 a.m. Plaintiff stated that she had difficulty sleeping at night. During the day Plaintiff cleans one room of her apartment. She stated that she cleans and rests while she cleans, and that it usually took her three hours to clean one room. [R. at 69]. According to Plaintiff, she is unable to sit or stand long enough to work.

Plaintiff additionally testified that she enjoys crocheting, reading, and sewing, but is only able to do each of these hobbies for approximately thirty minutes at a time. [R. at 71]. Plaintiff believes that she is still capable of typing 55 words per minute, but believes that she would only be able to sustain that speed for approximately 30 minutes. [R. at 75]. Plaintiff's medications make her sleepy. [R. at 77].

An RFC Assessment completed by Vallis D. Anthony, M.D., on November 20, 1992, noted that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk for six hours, sit for six hours, and push or pull an unlimited amount. [R. at 120]. An RFC completed by Luther Woodcock on February 15, 1994, confirmed Dr. Anthony's findings with respect to Plaintiff's

RFC. [R. at 149]. A Medical Assessment of Ability to Perform Work-Related Activities completed by Plaintiff's treating physician, Gary Davis, on July 17, 1995, indicated that Plaintiff could sit for only 10-30 minutes at a time, stand for 10 to 30 minutes at a time, walk for 10 to 30 minutes at a time, and do each of these activities for only four hours total out of an eight hour day. [R. at 13]. Dr. Davis indicated that Plaintiff could lift only 5-10 pounds infrequently, and carry 5-10 pounds infrequently. [R. at 13]. The record does not indicate whether this assessment was provided to the ALJ prior to his decision.[4/]

Plaintiff noted in a disability interview outline that she lived in an apartment that was on the second floor, and that although she sometimes took care of her granddaughter she was unable to pick up her granddaughter. [R. at 222].

Plaintiff was admitted on several occasions for treatment of her back pain. Plaintiff was admitted on July 29, 1992 and discharged on August 21, 1992 for treatment of back pain. [R. at 254]. Plaintiff was admitted on September 16, 1992 and discharged on September 19, 1992 for treatment of low back pain and muscle strain. Plaintiff was admitted on November 23, 1992 and discharged on November 28, 1992 for low back pain and chronic muscle strain. [R. at 277]. Plaintiff was admitted on January 20, 1993 and discharged on January 25, 1993 for treatment of small bowel obstruction. [R. at 343].

[4/] Plaintiff, in her brief, notes that the ALJ had this record prior to rendering his decision.

Plaintiff was admitted on June 21, 1991, and discharged on July 1, 1991 for major depression. [R. at 237].

A social security examiner examined Plaintiff on August 5, 1994. He noted that Plaintiff was able to lie down and pull herself up without any precautionary effort. He also noted that Plaintiff's heel/toe walking and hand grip strength were normal, and that when Plaintiff left and walked to the parking lot she seemed to stroll "okay." [R. at 318]. The examiner noted that Plaintiff complained of low back pain.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[5/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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[5/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[6/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as

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6/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ decided that Plaintiff could perform medium work. The ALJ noted that Plaintiff's past relevant work as a CRT operator, car rental agent and receptionist were not precluded by Plaintiff's RFC, and therefore concluded at Step Four that Plaintiff could return to her past relevant work.

IV. ISSUES ON APPEAL

Complete Record on Appeal

Plaintiff asserts that the record on appeal is not complete. Plaintiff notes that this is one of Defendant's duties and that Defendant specifically discussed two Exhibits in his decision, but neglected to include those exhibits in the record on appeal.

Defendant asserts that the documents which are missing from the transcript consist solely of emergency room treatment for complaints of breast

bone pain and shoulder pain, and a colonoscopy in January 1994. Defendant also asserts that Plaintiff could have submitted the additional exhibits and Defendant would not have objected.

As noted by Plaintiff, 42 U.S.C. 405(g) requires the Commissioner to file a certified copy of the transcript including the evidence upon which the ALJ's decision was made. The Court concludes, as discussed below, that this case must be reversed on other grounds. On remand, the Commissioner should locate the additional exhibits for inclusion in the record.

Evaluation of Pain and Treating Physician Standard

Plaintiff notes that she has numerous complaints of pain and that the ALJ improperly evaluated her complaints of pain. Plaintiff additionally asserts that a RFC Assessment which was completed by her treating physician was submitted to the ALJ prior to his final decision but that the ALJ did not discuss Plaintiff's physician's RFC evaluation.

Plaintiff's physician noted that Plaintiff could sit, stand, or walk for only ten to thirty minutes at a time and for no more than four hours total in an eight hour day. [R. at 13]. The record contains no discussion of Plaintiff's treating physician's evaluation. The ALJ, based on two other RFC's completed by non-examining physicians, concluded that Plaintiff was capable of performing medium work. Defendant does not address this argument. Defendant does discuss Plaintiff's complaints of pain. However, Defendant does not discuss whether or not the ALJ had a copy of the RFC completed by Plaintiff's treating physician prior to the issuance by the ALJ of his opinion. Defendant does not

address whether or not the ALJ should have discussed the RFC by the treating physician in his decision.

The Court is sufficiently concerned about the existence of the treating physician's RFC to remand the case for further evaluation. Dr. Davis hospitalized Plaintiff on several occasions for complaints of back pain and has treated Plaintiff for several years. On remand, the ALJ should address his evaluations of Plaintiff's RFC.

Step Four

Plaintiff notes that the ALJ ended his inquiry at Step Four, but that the ALJ did not make adequate Step Four findings. Plaintiff is correct.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

> The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.
>
> . . . .
>
> [D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ

must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

The ALJ in this case concluded that Plaintiff had the ability to perform medium work and then abrogated the remainder of his duty to the vocational expert. In this case, the vocational expert basically concluded that Plaintiff could return to her past relevant work. Step Four evaluations require a more in-depth analysis by the ALJ.

In the alternative, the ALJ could have concluded, at Step Five, that Plaintiff could perform work in the national economy. However, the ALJ did not make such a conclusion, and this Court is without the authority to draw such conclusions on its own.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 4 day of May 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES KENT MITCHELL,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

Case No. 96-CV-705-C

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his convictions in Tulsa County District Court, Case No. CF-94-4865. Respondent has filed a Rule 5 response (#4) to which Petitioner has replied (#7). As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

On April 27, 1995, Petitioner pled guilty to the offense of Carrying a Firearm into a Liquor Establishment, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CF-94-4865, and was sentenced to eight (8) years imprisonment. Petitioner did not move to withdraw his guilty plea or otherwise perfect a direct appeal of his conviction. On November 14, 1995, petitioner filed an Application for Post-Conviction Relief in Tulsa County District Court. The application was denied on December 28, 1995. Petitioner filed his Petition in Error in the Oklahoma Court of Criminal Appeals on February 1, 1996. On April 11, 1996, the Oklahoma Court of Criminal Appeals dismissed the post-conviction appeal, finding that

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> [a] party desiring to appeal the denial of post-conviction relief must file the required documents with the Clerk of this Court within thirty (30) days from the date of the final order of the District Court. Rules of the Oklahoma Court of Criminal appeals, 22 O.S.Supp.1995, Ch.18, app., Rule 5.2(C). Petitioner has failed to meet this requirement.

(#4, Ex. C). Petitioner then filed a "petition for re-consideration dismissing post-conviction" in the Oklahoma Court of Criminal Appeals, alleging that his post-conviction appeal was timely filed since he delivered the petition in error to prison mail room officials within thirty (30) days of his receipt of the district court's order denying post-conviction relief (#4, Ex. D). On July 10, 1996, the Oklahoma Court of Criminal Appeals entered its Order dismissing the petition for reconsideration, stating that pursuant to Rule 5.4, Rules of the Oklahoma Court of Criminal Appeals, a petition for rehearing or reconsideration of a post-conviction order is not allowed (#4, Ex. F).

Petitioner filed the instant petition for writ of habeas corpus on July 11, 1996, originally in the United States District Court for the Eastern District of Oklahoma where his motion for leave to proceed in forma pauperis was granted. On July 25, 1996, this habeas corpus action was transferred to this Court. In his petition for a writ of habeas corpus, Petitioner alleges one ground for relief: that the "States [sic] highest Court failed to address Merits of Petitioners [sic] claims." In support of this claim, Petitioner states that

> Court of Criminal Appeals has steadfastly refused to rule on Petitioners [sic] original Application for Post Conviction Relief as the denial was without merit. Petitoner [sic] ruled a Petition for Reconsideration, and submitted the attached Petition.
>
> Now, some 45 days later, the Court still refuses to answer said Petition for Reconsideration or to address the merits of the original Application for Post-Conviction Relief.

(#1, at 6).

ANALYSIS

As a preliminary matter, Respondent concedes and the Court agrees that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Although the procedural rules of the Oklahoma Court of Criminal Appeals provide that a petitioner can apply to the state district for a post-conviction appeal out of time where the petitioner believes he can demonstrate that he was denied an appeal "through no fault of his own," Smith v. State, 611 P.2d 276, 277 (Okla. Crim. App. 1980), the Court finds that to require Petitioner in this case to return to state court to pursue this remedy would be futile. Even if he were allowed a post-conviction appeal out of time, the state courts would impose a procedural bar on Petitioner's claims since he could have but did not raise his claims in a direct appeal. Oklahoma's Post-Conviction Procedure Act as well as a well-established line of cases in Oklahoma have made it clear that Oklahoma courts may not consider a claim in a post-conviction collateral attack where the facts supporting a petitioner's allegation(s) were available at the time of the direct appeal. 22 O.S. §§ 1080, et seq.; see also Webb v. State, 661 P.2d 904 (Okla. Crim. App. 1983); Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979).

Petitioner in this case complains that the Oklahoma Court of Criminal Appeals erroneously failed to address the merits of his claims raised in his post-conviction appeal. This Court may entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); Engle v. Isaac, 456 U.S. 107, 119 (1982). In this case, Petitioner has merely challenged the state court's dismissal of his post-conviction appeal for failure to follow state procedural rules. This allegation is insufficient in and of itself to justify

habeas corpus review. See Pulley v. Harris, 465 U.S. 37, 41 (1984) (stating that federal habeas relief may not be granted on the basis of a perceived error of state law); Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993). Furthermore, Petitioner does not allege his federal constitutional rights were violated by this alleged violation of state procedural rules. Thus, the issue is not cognizable under § 2254. Harvey v. Shillinger, 76 F.3d 1528, 1534 (10th Cir. 1996) ("the only injury that will suffice to support petition for habeas corpus relief is an injury to a petitioner's federally protected right; state law injuries cannot and do not suffice"); Chavez v. Kerby, 848 F.2d 1101, 1102 (10th Cir.1988) (claims of state procedural or trial errors without more are not cognizable in federal habeas proceedings); Bell v. Duckworth, 861 F.2d 169 (7th Cir. 1988) ("rule that procedural errors committed in state criminal [proceedings] are not ground for federal habeas corpus cannot be evaded by the facile equation of state procedural error to denial of due process"). Therefore, the Court finds that Petitioner is not entitled to federal habeas relief on his claim challenging the Oklahoma Court of Criminal Appeals' failure to address the merits of his claim.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 6th day of May, 1998.

H. DALE COOK
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NADINE SCOTT,

Plaintiff,

vs.

HOME HEALTH CARE PROVIDERS, INC.,

Defendant.

No.98-CV-195-C

ORDER

Currently pending before the Court is a motion filed by defendant Home Health Care Providers, Inc. ("Home Health") seeking to dismiss plaintiff Scott's complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Upon review of the complaint which is styled as a "petition," the Court finds defendant's motion well founded as Scott's complaint fails to allege federal jurisdiction. This is fatal to plaintiff's action because "federal courts are courts of limited jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." Penteco Corp. Ltd. Partnership -- 1985A v. Union Gas Sys., Inc., 929 F.2d 1519, 1521 (10th Cir. 1991). Plaintiff must allege subject matter jurisdiction either under a federal question, pursuant to 28 U.S.C. § 1331, or through complete diversity, pursuant to 28 U.S.C. § 1332. "A case arises under federal law if its 'well pleaded complaint either establishes that federal law creates a cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994)(quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-8 (1983)). Plaintiff's complaint, however, merely alleges a retaliatory discharge for filing a

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workers compensation claim which is woefully insufficient to confer federal question jurisdiction. Further, plaintiff's complaint fails to allege any diversity of citizenship between parties or a sufficient amount in controversy as her requested relief of $10,000 is well short of the $75,000 statutory minimum. 28 U.S.C. § 1332(a). In light of the foregoing discussion, the Court dismisses Scott's complaint for want of jurisdiction.

Accordingly, defendant Home Health's motion to dismiss is hereby GRANTED.

IT IS SO ORDERED this 6th day of May, 1998.

H. DALE COOK
Senior United States District Judge

09550027/sdn

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 4 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRANSCONTINENTAL INSURANCE COMPANY,)
CONTINENTAL CASUALTY COMPANY,)
VALLEY FORGE INSURANCE COMPANY and)
TRANSPORTATION INSURANCE COMPANY,)
)
Plaintiffs,)
vs.) Case No. 98CV0035B(W)
)
SUN DIAL PAINTING, INC., an Oklahoma Corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE MAY 06 1998

JOURNAL ENTRY OF JUDGMENT BY DEFAULT

NOW on this 4 day of ~~March~~ May, 1998, this matter comes on for consideration on Plaintiffs' Motion for Default Judgment. Pursuant to Rule 55 of the Federal Rules of Civil Procedure, this Court hereby enters judgment for the sum certain amount requested by Plaintiffs in the amount of $101,252.00, plus court costs in the amount of $150.00 and a reasonable attorneys fee in the amount of $ 855.00.

IT IS THEREFORE ORDERED. ADJUDGED AND DECREED that Plaintiffs are hereby granted judgment against the Defendant in the amount of $101,252.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs are granted judgment for costs in the amount of $150.00 and for a reasonable attorneys fee in the amount of $ 855.00.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY - 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROL STONE, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 98-CV-0140K(M)**
	)	
ALLSTATE INSURANCE COMPANY, an Illinois corporation; and CATHERINE G. MARTIN,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE MAY 06 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Carol Stone, and hereby dismisses, with prejudice, the above-styled action.

Carol Stone
Plaintiff

Timothy Harmon
Attorney for Plaintiff

Michael P. Atkinson
Galen L. Brittingham
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARCRO, a Division of ARB, INC., a California corporation,	)	FILED
	)	MAY - 5 1998
Plaintiff,	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
v.	)	**Case No. 95-C-130-H**
DANZAS CORPORATION, a New York corporation,	)	ENTERED ON DOCKET
Defendant.	)	DATE 5-6-98

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff, Harcro, a Division of ARB, Inc., a California corporation and Defendant, Danzas Corporation, a New York corporation, hereby stipulate that pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the above-entitled action is discontinued and dismissed with prejudice to further cause of action and without cost to either party.

Dated: May 5, 1998

RONALD MAIN & ASSOCIATES

By: Ronald Main

Ronald Main, OBA #5634
P. O. Box 521150
2800 Center, Suite 821
2815 East Skelly Drive
Tulsa, Oklahoma 74152-1150

Attorneys for Plaintiff, Harcro, a Division of ARB, Inc.

SNEED LANG, P.C.

By: _____

James C. Lang, OBA #5218
Stephen R. McNamara, OBA #6071
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103-3136
(918) 583-3145

Attorneys for Defendant,
Danzas Corporation

C:\DATA\2155.1\PLEADING\DISMISSA.WPD

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRI BLANCHETT

446-48-2983 Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-809-K(M)

REPORT AND RECOMMENDATION

Plaintiff filed his complaint on September 3, 1997. On December 22, 1997, the undersigned United States Magistrate Judge issued an order noting that there had been no return of service. The Court advised Plaintiff that the action would be subject to dismissal pursuant to Fed.R.Civ.P. 4 if a return of service were not filed within 30 days. Over 90 days have passed since the deadline and still there has been no return of service filed.

Fed.R.Civ.P. 4(m) provides, as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or its own initiative after notice to the plaintiff, *shall dismiss the action without prejudice as to that defendant* or direct that service be effected within a specified time; . . . [emphasis supplied].

This Court has already directed that service be effected within a specified period of time, to no avail. It is therefore the RECOMMENDATION of the undersigned United

States Magistrate Judge that pursuant to Fed.R.Civ.P. 4(m) the action be DISMISSED WITHOUT PREJUDICE.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 5th Day of May, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 6th Day of May, 1998.

L. Portillo, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

TRAVIS W. BROWNING,

Plaintiff,

vs.

RIO ALGOM, INC., a Delaware corporation d/b/a/ VINCENT METAL GOODS, TIM WARNER individually and as an employee of VINCENT METAL GOODS,

Defendants.

No. 97-CV-405 K(W)

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, by and between Plaintiff and Defendants, through Plaintiff's counsel and Defendants' counsel, that Plaintiff's action against Defendants and Defendants Counterclaim against Plaintifff may be and is hereby dismissed with prejudice and without costs to any of the parties to this action.

FELHABER, LARSON, FENLON & VOGT, P.A.

By: _____

David L. Hashmall, admitted pro hac vice
Katherine A. Jones, admitted pro hac vice
601 Second Avenue South, Suite 4200
Minneapolis, Minnesota 55402-4302
(612)339-6321

CROWE & DUNLEVY

Randall Snapp (OBA #11169)
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(918)592-9810
ATTORNEYS FOR DEFENDANT RIO ALGOM

WILLIAM HUGHES, ESQ.

320 South Boston Avenue
Suite 1020
Tulsa, Oklahoma 74103

ATTORNEY FOR DEFENDANT TIM WARNER

RICHARD M. KLINGE & ASSOCIATES

By: _____
Leif Swedlow (OBA # 17710)
228 Robert S. Kerr Ave., Suite 940
Oklahoma City, Oklahoma 73102-5201

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY McELWAIN, an individual,

Plaintiff,

vs. No. 97-CV-1069-B(W)

TERRA NITROGEN, INC., a Delaware corporation, and TERRA NITROGEN CORPORATION, a Delaware corporation,

Defendants.

ORDER

Now on this 1st day of May, 1998, the above styled case comes on for case management conference and the Court, being fully advised, finds the plaintiff failed to appear after notice, having previously failed to participate in preparation of the joint case management plan as required by N.D. LR 16. Defendants appeared as noticed and announced ready to proceed. Accordingly, the Court finds plaintiff's complaint shall be dismissed without prejudice for failure to prosecute pursuant to Fed. R.Civ.P. 41. (b). Each party shall bear their own costs and attorney's fees.

IT IS SO ORDERED.

THE HONORABLE THOMAS R. BRETT
UNITED STATED DISTRICT JUDGE

12

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOROTHY F. THOMPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 97-C-767-M**
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
	)	
Defendant.	)	

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

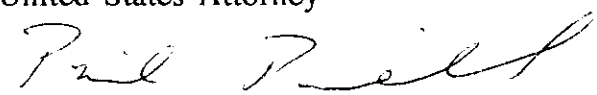
DATED this 1st day of May 1998.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

(11)

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY F. THOMPSON,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 97-CV-767-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 1ST day of MAY, 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(12)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER MARLIN BROWN, Appellant, v. WILLIAM J. ZAREK; and COPPOLA, SANDRE & McCONVILLE, P.C., Appellees.	)	ENTERED ON DOCKET DATE 5-1-98 Case No. 98-CV-98-H(J)

FILED

APR 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 11) with respect to Appellees' motions to dismiss this bankruptcy appeal (Docket # 2, 4). Appellant has filed an objection to the Report and Recommendation.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

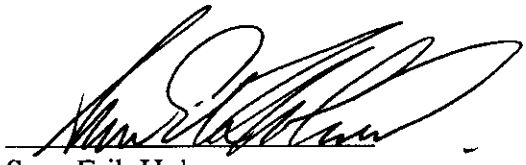
The Magistrate Judge recommended that the Court grant Appellees' motions to dismiss the bankruptcy appeal since Appellant's notice of appeal was untimely and not filed within ten days as required by Fed. R. Bankr. P. 8002(a). Appellant objected, claiming that the Magistrate

Judge does not have jurisdiction to hear this matter and that his notice of appeal was timely filed.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge and Appellant's objection, the Court finds that the Report and Recommendation granting Appellees' motions to dismiss (Docket # 11) should be adopted. Thus, Appellees' motions to dismiss (Docket # 2, 4) are hereby granted.

IT IS SO ORDERED.

This 30TH day of April, 1998.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JAMES H. DOROUGH, et al.

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ENTERED ON DOCKET
DATE 5-1-98

CASE NO. 96-CV-1139-H

FILED
APR 30 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT ENTRY

This action came on for a trial before the Court, Honorable Sven Erik Holmes presiding, and the issues having been duly tried and a Decision having been duly rendered.

It is Ordered and Adjudged that the Plaintiff take nothing and that the action be dismissed on the merits.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CHARLES P. HURLEY
Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-6498

JAMES E. BISHOP, ESQ.
BILL V. BRUMLEY, JR., ESQ.
Brumley & Bishop
Petroleum Club Building
604 South Boulder Avenue
Suite 604
Tulsa, Oklahoma 74119-1306
601

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATIENCE SARPONG,

Plaintiff,

vs.

No. 98-C-13-K

BRAUM'S ICE CREAM, INC.,

Defendant.

ENTERED ON DOCKET
DATE 5-1-98

O R D E R

On April 14, 1998, Magistrate Judge Eagan entered her Report and Recommendation, after hearing, regarding defendant's motion to dismiss. The Magistrate Judge recommended the motion be granted. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72 F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the motion of the defendant to enforce settlement agreement and to dismiss (#6) is hereby GRANTED. This action is dismissed with prejudice.

ORDERED this 30 day of April, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN WIRE CLOTH, INC., et al.,

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE, et al

Defendants.

No. 97-C-156-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 30 day of April, 1998.

Terry C Kern

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

15

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL J. WILDER,

Plaintiff,

vs.

CURTIS ECKWOOD - ECKWOOD ENTERPRISES,

Defendant.

Case No. 98-CV-290-BU

ORDER

On April 16, 1998, Plaintiff, Samuel J. Wilder, filed an Affidavit of Financial Status which the Court construes as a motion to proceed in forma pauperis under 28 U.S.C. § 1915. Based upon the representations of Plaintiff, the Court finds that Plaintiff's motion should be granted.

Section 1915(e)(2)(B)(ii) of Title 28 of the United States Code provides in pertinent part that "the court shall dismiss the case at any time if the court determines that ... the action ... fails to state a claim on which relief may be granted ...." 28 U.S.C. § 1915(e)(2)(B)(ii). Upon review of Plaintiff's Complaint, the Court finds that Plaintiff has failed to state a claim against Defendant, Curtis Eckwood - Eckwood Enterprises under 42 U.S.C. § 1983. The Complaint fails to allege any facts tending to show that Defendant was a "state actor." Section 1983 provides that "every person" who acts "under color of" state law to deprive another of constitutional rights shall be liable in a suit for damages. To state a claim under section 1983, a plaintiff must show in part that the alleged violation was committed by a person acting under

(6)

the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 928 (1982), the Court noted that if a defendant's conduct satisfies the requirement of "state action" under the fourteenth amendment, it also satisfies the "under the color of state law" requirement for section 1983. The Lugar Court made clear that for conduct of a private party to constitute "state action" it must be "fairly attributable to the State." 457 U.S. at 937. Thus, to be a state actor, the defendant must be a state official or have acted together with or obtained significant aid from a state official or have done something otherwise chargeable to the state. Id.

One way to show joint action between a defendant and a state official is to demonstrate a conspiracy. Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989). In this case, Plaintiff makes conclusory allegations of a conspiracy. However, as stated by the Tenth Circuit in Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983), "mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action. Because Plaintiff has failed to allege any facts tending to show an agreement and concerted action between Plaintiff and a state official, the Court finds that Plaintiff has not shown joint action by conspiracy. Carey v. Continental Airlines, Inc., 823 F.2d 1402, 1404 (10th Cir. 1987). The Court thus concludes that Plaintiff's section 1983 claim against Defendant must be dismissed pursuant to section 1915(e)(2)(B)(ii).

To the extent that Plaintiff is alleging a claim against Defendant under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Court finds that such claim is also subject to dismissal under section 1915(e)(2)(B)(ii). Plaintiff has failed to allege an injury in his business or property. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3rd Cir. 1987). Plaintiff has also failed to allege a pattern of racketeering activity. Boone v. Carlsbad Bancorp, 972 F.2d 1545, 1555 (10th Cir. 1992).

Accordingly, Plaintiff's motion to proceed in forma pauperis is GRANTED. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff's Complaint against Defendant, Curtis Eckwood - Eckwood Enterprises, is DISMISSED.

ENTERED this 30 day of April, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DR. ROBERT ZOELLNER,

Plaintiff,

vs.

EYEMART EXPRESS, INC.,

Defendant.

Case No. 98-CV-95-BU

ORDER

This matter came on for hearing before the Court on April 30, 1998 upon Defendant's Motion to Stay Proceedings and to Compel Arbitration. As stated by the Court at the hearing, the Court concludes that the parties' dispute is subject to arbitration and that a stay of these proceedings is appropriate.

Accordingly, the Court ORDERS as follows:

1. Defendant's Motion to Stay Proceedings and to Compel Arbitration (Docket Entries #7-1 and #7-2) is GRANTED.

2. The Clerk of the Court is DIRECTED to administratively close this matter in his records pending resolution of the arbitration proceedings. The parties are DIRECTED to notify the Court when resolution of the arbitration proceedings has occurred so that the Court may reopen these proceedings, if necessary, for final resolution of the action.

ENTERED this 30th day of April, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(10)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DIRTY BUTTER CREEK GANG PRODUCTIONS, INC., and K-25 TELEVISION, INC.,

Plaintiffs,

vs.

KALEIDOSCOPE AFFILIATES, LLC, INC.,

Defendant.

Case No. 97-C-959-BU

ORDER

This matter came before the Court on April 30, 1998 for a final pretrial conference. Plaintiffs and Defendant failed to appear. Upon due consideration, the Court finds that dismissal of this matter without prejudice is appropriate. In addition to failing to appear at the final pretrial conference, the parties have failed to file an agreed pretrial order as required by the Court's Scheduling Order. Plaintiffs and Defendant have also failed to comply with the Court's directive to have new counsel enter an appearance in this case by April 13, 1998 and April 27, 1998, respectively. The Court specifically advised Plaintiffs that a failure to do so may result in a dismissal of this action without prejudice.

IT IS THEREFORE ORDERED that this action is DISMISSED WITHOUT PREJUDICE.

ENTERED this 30th day of April, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(32)

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

SAMUEL JAY WILDER,

Plaintiff,

vs.

CURTIS ECKWOOD - ECKWOOD ENTERPRISES; CITY OF TULSA; TULSA COUNTY COMMISSIONERS (JUDGES - MICHAEL GASSETT, GORDON McALLISTER, HOWARD MEFFORD),

Defendants.

Case No. 97-C-258-BU

ORDER

On March 24, 1998, this Court entered an order granting the motion of Defendant, City of Tulsa, to dismiss Plaintiff's claim under the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. § 1961, et seq. In the same order, the Court, construing Plaintiff's pleadings liberally, concluded that Plaintiff was also alleging a claim against Defendant under 42 U.S.C. § 1983 for false arrest. As Defendant, City of Tulsa had not had an opportunity to answer or otherwise respond to that claim, the Court directed Defendant to answer or otherwise respond to the claim by April 6, 1998.

In accordance with the Court's directive, Defendant responded to the claim by filing a motion to dismiss on April 6, 1998. Defendant contends that Plaintiff's conclusory allegations do not state a claim for relief under § 1983. Defendant contends that Plaintiff has made no allegation that his arrest was unlawful nor

(56)

has he alleged any facts which could lead the Court to conclude that the Tulsa Police Department acted without lawful authority. In addition, Defendant contends that Plaintiff has made no allegation that an official policy or custom deprived him of any constitutional right.

On April 13, 1998, Plaintiff filed a response brief to Defendant's motion. Plaintiff, however, does not address the specific arguments of Defendant. The Court finds that the pleading is, in effect, no response to Defendant's motion.

Upon review, the Court concludes that dismissal of Plaintiff's § 1983 claim against Defendant is warranted. A municipality cannot be held liable solely because it employs a tortfeasor - or, in other words, a municipality cannot be held liable under § 1983 on a respondent superior theory. Board of County Com'rs of Bryan County, OK v. Brown, ____ U.S. ____, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). In order to impose liability upon a municipality under § 1983, a plaintiff must identify a municipal "policy" or "custom" that caused his injury. Id. The Court agrees with Defendant that Plaintiff has failed to identify a policy or custom attributable to Defendant. Id. Further, Plaintiff has failed to alleged that the policy or custom was the "moving force" behind the injury alleged. Id.

Accordingly, Defendant, City of Tulsa's Motion to Dismiss (Docket Entry # 47) is GRANTED. In light of the Court's ruling herein and the Court's ruling in the April 6, 1998 Order, Plaintiff's complaint against Defendant is DISMISSED in its

entirety.

ENTERED this 30th day of April, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE